Nos. 97-1087 and 97-1099

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GTE MIDWEST INCORPORATED,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

U S WEST, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONSE OF MCI TELECOMMUNICATIONS CORPORATION TO GTE'S AND U S WEST'S CONDITIONAL CROSS-PETITIONS

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QUESTIONS PRESENTED

1. Did the Eighth Circuit correctly apply *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* and give appropriate deference to a Federal Communications Commission rule that competitors seeking to provide local telephone service may provide service entirely through combinations of unbundled network elements leased from the incumbent local telephone company.

2. Did the Eighth Circuit correctly apply *Chevron* and give appropriate deference to an FCC rule that the incumbent telephone company's operator services and operational support systems fall within the statutory definition of "network elements" that must be provided to competitors on an unbundled basis.

3. Did the Eighth Circuit correctly apply *Chevron* and give appropriate deference to an FCC rule defining the statutory requirement that in determining whether or not to make network elements available to competitors, the Agency should consider among other factors whether access to proprietary elements is "necessary" and whether failure to provide access would "impair" a competitor's ability to provide telephone service.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent MCI states as follows:

MCI Telecommunications Corporation is a wholly-owned subsidiary of MCI Communications Corporation. MCI has the following non-wholly owned subsidiaries: General Communications, Inc.; IFP Holdings, Inc.; ICS Communications, Inc.; Digital Network Television, Inc.; Genesys Telecommunications, Inc.; Inflight Phone Corp.; Multimedia Medical Systems, Inc.; News T Investments, Inc.; News Triangle Finance, Inc.; Pioneer Holding L.L.C.; Portugal Telecom; and Security Technologies, Inc.

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RESPONSE OF MCI TELECOMMUNICATIONS CORPORATION TO GTE'S AND U S WEST'S CONDITIONAL CROSS-PETITIONS

MCI Telecommunications Corporation ("MCI") acquiesces in a grant of certiorari on the first question presented in the above-captioned petitions, conditioned upon the granting of the related question in MCI's petition for certiorari (No. 97-829), and opposes certiorari on the second and third questions presented.

STATEMENT OF THE CASE

In the second and third of what is now a series of conditional cross-petitions for certiorari, GTE Midwest Incorporated ("GTE") and U S WEST, INC. ("U S WEST") challenge the Eighth Circuit's decision to uphold Federal Communications Commission's ("FCC") regulations implementing the incumbent local telephone monopolists' obligation to provide nondiscriminatory access to parts of their network to potential competitors under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act" or "Act"). There are some 37 different subsections of FCC regulations implementing these so-called "unbundling" regulations, each of which was subject to challenge on a variety of different grounds at the Eighth Circuit. *See* 47 C.F.R. §§ 51.307-51.321. The court, purporting to apply the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), struck down some and upheld others. As MCI stressed in its certiorari petition, the most critical of these subsections is § 51.315(b), which prohibited incumbent monopolists from imposing on new entrants like MCI discriminatory costs that make competitive entry through the use of combinations of unbundled elements virtually impossible in wide segments of the market.

Here GTE and U S WEST conditionally seek review, collectively, of four other FCC "unbundling" regulations. By making their cross-petitions conditional, cross-petitioners acknowledge that none of these issues is independently worthy of review. They insist, however, that the issues they raise are "inextricably interrelated" with the Eighth Circuit's invalidation of 47 C.F.R. § 51.315(b), GTE Cross-Pet. 2, such that if the Court decides to review that question, it must also grant their questions to avoid "an out-of-context and partial review of the lower court's" ruling. *Id.* at 4.

Principally, GTE and U S WEST join the Regional Bell Operating Companies ("RBOCs") in conditionally challenging the Eighth Circuit's decision to uphold 47 C.F.R. § 51.307(a), which allows potential competitors to lease network elements from the incumbent local exchange carriers ("incumbent LEC"), without inquiry into whether the competitors employ any faciliites of their own.[1] As discussed in MCI's response to the same first question presented in the RBOCs' conditional cross-petition,[2] GTE's and U S WEST's first question presented does raise issues the Eighth Circuit believed to be interrelated with its decision to vacate § 315(b). For the reasons set out in MCI's earlier response, MCI therefore acquiesces in the granting of the first questions presented, so that they can be considered along with the related questions raised in its petition.

Accordingly, MCI limits its response here to the additional questions that GTE and U S WEST insist also should be granted only because they are "inextricably interrelated" with the questions raised in the earlier petitions.[3]

In its second question presented, GTE challenges the Eighth Circuit's decision to uphold the FCC regulation that defines operator services and operational support systems to be "network elements" that must be leased to competitors on a nondiscriminatory basis. Appendix to AT&T *et al.*'s Petition for Certiorari in No. 97-826, at

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[1] *See* No. 97-1075, Conditional Cross-Petition of Ameritech Corp. *et al.* (First Question Presented) ("RBOC Cross-Pet.").

[2] *See* No. 97-1075, MCI's Response to RBOC Conditional Cross-Petition at 4-8 ("MCI Response").

[3] U S WEST's second question presented raises the identical issue raised in the second question presented in the RBOCs' Cross-Petition, and as to that question U S WEST merely adopts the RBOCs' arguments. In response, MCI accordingly rests on its discussion of this point in its response to the RBOCs' cross-petition. *See* MCI's Response at 8-12.

41a-45a ("Pet. App.). *See* 47 C.F.R. §§ 51.319(f), (g). "Operator services" are not simply (or primarily) the telephone operators with whom customers speak when they dial "0" or "911," but include the call-routing hardware and software that control the operator service functions. Further, operator services are often provided without any involvement of a live operator when, for example, a customer makes a "0+" telephone call. By determining that such services are a "network element" that must be "unbundled" from the incumbent LEC's network, the FCC made it clear that a competitor offering service through elements leased from an incumbent LEC could lease use of the incumbent's operator services, or, conversely, lease other parts of that network *without* also having to lease operator services. The Eighth Circuit deferred to this judgment, concluding that operator services are "features, functions and capabilities that are provided by facilities and equipment that are used in the provision of telecommunications service," and for that reason are a network element within the definition of 47 U.S.C. § 153(29). Pet. App. 44a-45a.

Operational support systems ("OSS") are the systems that enable the telephone company to interact with its customers' requests in ordering, repairing or billing telephone service. When a competitor is offering service using the incumbent's unbundled network elements, it too has to be able to order those elements, call in repairs, and obtain the information necessary to bill its customers.

GTE argues, however, that it has no statutory obligation to make *its* OSS available to assure that a competitor's retail customers can order service (or report problems) through GTE's network as quickly or efficiently as can GTE's own customers. The FCC rejected this argument. It required the incumbents to provide access to their OSS on three independent statutory grounds: (i) that OSS are "network elements" as the 1996 Act defines them because they are "databases" or "facilit[ies] . . . used in the provision of a telecommunications service,"

see § 153(29); (ii) that the systems are network elements because the information they contain is "information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service" (*id.*); and (iii) that irrespective of whether OSS are themselves network elements, nondiscriminatory access to OSS is a necessary prerequisite to the statutory requirement that incumbent LECs provide nondiscriminatory access to *other* network elements that are ordered and repaired by means of that OSS.[4] The FCC found that unless competitors offering service through the incumbents' network elements are able to order service, repair defective service, and bill for service as efficiently as the incumbent, they would be under an insurmountable competitive disadvantage.

The Eighth Circuit deferred to this FCC rule, relying on the first and second of the FCC's three grounds—that OSS is a "facility . . . used in the provision of a telecommunications service" within the statutory definition of "network element," 47 U.S.C. § 153(29), and that it is also a "database . . . sufficient for billing and collection." *Id. See* Pet. App. 42a-44a.[5]

In GTE's and U S WEST's third question presented, cross-petitioners challenge the Eighth Circuit's decision to uphold the FCC's regulations concerning competitors' access to network elements. The Act required the FCC to consider whether access to those network elements that are proprietary in nature is "necessary," and whether the failure to provide access would "impair the ability of the tele-

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[4] *See In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, CC Docket No. 96-98, FCC 96-325, ¶ 517 (Aug. 8, 1996) ("Local Competition Order").

[5] GTE did not challenge—and the Eighth Circuit did not address—the FCC's third ground for requiring incumbent LECs to make their OSS available to their competitors: that it was a necessary part of making available *other* network elements.

communications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(A), (B). *See* Local Competition Order, ¶ 283. As the court of appeals described, "the Commission determined that an element proprietary in nature would be 'necessary' if a requesting carrier's ability to compete would be 'significantly impaired or thwarted' without it." Pet. App. at 47a-50a, quoting Local Competition Order, ¶ 282. And, the Commission determined that it would consider a carrier's ability to provide service to be impaired "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." Local Competition Order, ¶ 285.

Cross-petitioners argue that "necessary" instead should have been interpreted to mean "indispensable," and that, in particular, access to a proprietary element should *never* be "necessary" if it would be possible for a competitor to build the element itself or obtain it from another source. They also argue that "impairment" should relate only to a competitor's technical capability to provide a service, without reference to either cost or quality of service. The Eighth Circuit rejected these arguments, concluding that "the Commission reasonably interpreted these standards," and that the "FCC's interpretation of 'necessary' is a reasonable one and entitled to deference. *See Chevron*, 467 U.S. at 844," Pet. App. 47a-49a. *See also id.* at 50a (same as to "impair").

In deferring to the FCC regulations concerning operator services, OSS, and the "necessary" and "impair" rules, the Eighth Circuit did *not* rely in any way upon—or even mention—those parts of its decision that discussed the alleged need to distinguish resale from unbundled network elements as alternative routes of competitive entry. Neither did it make any mention of operator services, OSS, or the "necessary" and "impair" rules in its subsequent decision on rehearing striking § 51.315(b).

ARGUMENT

GTE and U S WEST acknowledge that none of the issues they raise is independently worthy of certiorari, and for good reason. Their questions involve straightforward application of *Chevron* deference principles to the court of appeals' plainly correct decision to defer to obviously lawful regulations. Instead, GTE and U S WEST, like the RBOCs in their conditional cross-petition filed last week, appear randomly to have chosen a few from among the two score of FCC regulations concerning the Act's unbundling requirements affirmed by the Eighth Circuit, and claimed that they must be considered along with the Eighth Circuit's invalidation of § 315(b) because they are "inextricably interrelated" to that issue.

Stripped of its rhetoric, cross-petitioners' logic proceeds as follows: So long as the Eighth Circuit has vacated § 315(b) and so as a practical matter prohibited competitors from making use of unbundled network elements, the other forty regulations that implement the details of the unbundling relationship are a dead letter and so a matter of indifference. If § 315(b) is reinstated and competition through unbundled elements once again becomes possible, however, then GTE and U S WEST would like to continue to fight the particular unbundling obligations imposed on them by the FCC. In that sense, and in that sense only, the unbundling issues presented in the second and third questions presented "relate" to the court of appeals' invalidation of § 315(b). This is not sufficient.

These questions involve different statutory provisions and different regulations. As we show in what follows, neither § 315(b), the statutory provision it implements (47 U.S.C. § 251(c)(3)), the FCC's Order explaining and defending its regulatory decision, nor the Eighth Circuit's decision vacating that regulation, so much as even mention operational support system, operator services or the "necessary" and "impair" standards.

Because these issues are neither independently worthy of plenary consideration nor related to the court of appeals' disposition of issues that do merit such review, review should be denied. Nor should the cross-petitioners' diversionary tactics lead the Court to believe that the focused, critical issue of the invalidation of § 315(b) would be difficult to address because it is somehow inseverable from the many particularized applications of *Chevron* that are the subjects of these meritless serial conditional cross-petitions.

1. The FCC determined that both operational support systems and operator services are "network elements" that accordingly can be unbundled from the incumbent LECs' network and leased to competitors at cost-based rates. In reaching this conclusion, the FCC relied upon the statutory definition of "unbundled network element" as

> a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including . . . databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

47 U.S.C. § 153(29).

This definition plainly encompasses a telephone company's OSS. GTE insists that OSS does not fall within this statutory definition because it is not a "physical part of the call-routing network," GTE Cross-Pet. 22. But the statutory definition does not limit "network elements" to "call-routing facilities," as it encompasses all facilities used "in the transmission, routing, or *other* provision of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). That definition also explicitly encompasses OSS functions like "billing and collection" which are neither "physical" nor "parts of the call-routing network."

GTE rejects the notion that competitors should be able to perform customer service functions "in 'substantially

the same time and manner that an incumbent can for itself,' [Local Competition Order] ¶ 518," GTE Cross-Pet. 23-24, because such parity would require that the competitor have access to GTE's OSS. In GTE's view, it should be under no obligation to handle requests for orders and repairs of its network elements in parity with its own handling of such requests, and certainly should not be required to resolve customer demands through the same efficient systems it uses to service its own customers. But as the FCC observed, competition through unbundled network elements would never develop if the incumbents resolve competitor's customer service orders, billing inquiries, and repair calls in an inferior way to the way they resolve their own customers' similar requests. Local Competition Order ¶¶ 510, 518-519. In any event, GTE never even challenged the FCC's alternative ground for requiring incumbents to make their OSS available to competitors; that incumbents could not satisfy their obligation to provide nondiscriminatory access to *other* network elements such as local loops or switching unless they also provided the OSS that would make it possible to order, repair and bill for the use of such elements. *Id.* ¶ 517. That is reason enough to deny certiorari on this question.

GTE's arguments about operator services are no better. Operators services too are plainly "equipment used in the provision of a telecommunication service." 47 U.S.C. § 153(29). They are used to route calls, which GTE (wrongly) insists is the *sine qua non* of a "network element." GTE also repeats the argument made by the RBOCs in their conditional cross-petition that functions like operator services (or, in the RBOC petition, vertical features) cannot be "network elements" because they are "services." *See* RBOC Cross-Pet. 22-24. As explained in more detail in the response to that cross-petition, *see* MCI Response 9-11, the short and sufficient answer to that argument is that nothing in the Act says or suggests that "elements" and "services" are mutually exclu-

sive categories; to the contrary, if such a rule were adopted incumbents could successfully avoid the unbundling requirements of the Act through the simple expedient of offering elements of their network for sale as "services" to their retail customers.

2. Neither do GTE or U S WEST suggest that the affirmance of the FCC's "necessary" and "impair" standards independently raises a question meriting certiorari. The FCC could hardly have been on firmer ground in rejecting their claim that "necessary" must mean "indispensable," an interpretation that this Court has rejected in a similar context as too rigid for a word that should "be harmonized with its context." *Armour & Co. v. Wantock*, 323 U.S. 126, 129-30 (1944). *See also M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819) ("necessary" means "convenient, or useful"). The court of appeals determined that the FCC's definition was "a reasonable one and entitled to deference," Pet. App. 49a, agreeing with the FCC that "[a]n overly strict reading of the word 'necessary,' as the petitioners propose, would unduly restrict the unbundling duty of incumbent LECs and hinder the development of competition in the local telecommunications industry." *Id.*

By the same token, the court found the FCC's definition of "impair" to be consistent with dictionary definitions and consistent as well with the Act's pro-competitive purposes. It therefore concluded that the agency's definition was entitled to deference under *Chevron*. Pet. App. 50a. As to both of these statutory phrases, cross-petitioners would have preferred a statute in which potential competitors could not lease parts of their networks unless they could prove that they could not build the part for themselves, or purchase it at any cost from some other provider. Obviously, of a competitor could obtain network elements more efficiently from third parties, it would do so. But if (as is likely) because of economies of scale and

scope, the incumbent monopolist is the most efficient source of a network element, the Act requires that those economies be shared with competitors. As the Eighth Circuit observed, Congress required that the monopolists' network elements be made available for lease precisely because it required the incumbent to share those economies with potential competitors, and because of the extraordinary time and expense involved in constructing duplicate ubiquitous telephone networks.[6] And, apart from all of that, the "necessary" and "impair" rules do not do the work that cross-petitioners claim. They are simply two nonexclusive, nonexhaustive statutory factors the FCC is to consider along with any other factors it believes to be appropriate in determining whether to make network elements available. In sum, this question concerns the Eighth Circuit's straightforward and obviously correct application of *Chevron* to a relatively inconsequential rule.

3. Most to the point, GTE and U S WEST are plainly incorrect in stating that either of these questions is sufficiently related to the § 315(b) issue to warrant a grant to ensure that the § 315(b) issue is decided "in context." GTE Cross-Pet. 4. *See also* U S WEST Cross-Pet. 2. As we have just shown, the Eighth Circuit's ruling about OSS and operator services is grounded in its analysis of the statutory definition of "network element." And the court's ruling about the FCC's "necessary" and "impair" standards is grounded in its understanding of those statutory terms, supported by consistent dictionary definitions and previous judicial decisions interpreting those terms. None of these issues involving discrete network elements has anything at all to do with how network elements are to be combined together, or with which party is responsible for combining them. Accordingly, the court's discussion of operator services, OSS, and the "necessary" and "impair"

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[6] Pet. App. 48a. *See* H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 148 (Jan. 31, 1996).

regulations made *no* reference to § 315, to the alleged risks of using unbundling to avoid resale rates, to the alleged risks of regulatory arbitrage or to the risk to alleged universal service subsidies that GTE and U S WEST claim are at the heart of the court's decision to vacate § 315(b). To the extent broader policy considerations colored the court's decision to defer to the agency's definitions of "necessary" and "impair," the court deferred to the FCC's judgment that "the procompetitve effects of unbundling under the Commission's rules could spur enough innovation to offset any potential reduction in innovation that the unbundling standard might cause." Pet. App. 50a. This is not a policy consideration that played a role in the court's consideration of § 315(b).

In contrast, the "context" of the court's decision to vacate § 315(b) was its mistaken belief that the statutory term "unbundle" referred to the physical disconnection of combined network elements so that competitors would be forced to recombine them, coupled with the court's broad and ill-conceived policy judgment that there was a need to distinguish resale from unbundled network elements more clearly than the FCC regulations had accomplished. In reaching that conclusion, the Eighth Circuit neither relied on nor made any reference to 47 U.S.C. § 251(d)(2), the FCC's "necessary" and "impair" regulations implementing that provision, or the supposed need to encourage competitors to build their own facilities. It similarly made no mention of the regulations concerning operator services or OSS, or the statutory definition of "network element" in 47 U.S.C. § 153(29). In sum, if the Court decides to review the Eighth Circuit's invalidation of § 315(b), it will not have any need or occasion to review either the particulars or the generalities of the lower court's decision to defer to the FCC's OSS, operator services, or "necessary" and "impair" regulations. Since that is the only reason cross-petitioners argue certiorari should be granted on these questions, certiorari should be denied.

CONCLUSION

The Court should grant the conditional cross-petitions' first question presented at the same time it grants the related questions presented in the petitions filed by the United States, MCI, and AT&T *et al.* The Court should deny the petitions on the second and third questions presented.

Respectfully submitted,

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